

BRADLEY A. CUE

VS.

Respondent

AND

Insurance Carrier

AND/OR

Docket No. 154,407

ORDER

The application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated March 16, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Randy S. Stalcup of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Orvel B. Mason of Arkansas City, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant met with personal injury by accident arising out of and in the course of his employment with respondent on February 5, 1991.
- (2) The nature and extent of claimant's injury and disability.
- (3) Claimant's average weekly wage.
- (4) Whether the Kansas Workers Compensation Fund should bear a portion of the liability for this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Special Administrative Law Judge in his Award of March 16, 1994, awarded claimant a ten percent (10%) permanent partial general body impairment of function for the injuries suffered on February 5, 1991. Based upon the evidence and facts discussed hereinbelow, the Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that he suffered a compensable injury arising out of and in the course of his employment with the respondent on February 5, 1991.

Claimant began his employment with Boeing in August 1980 as a tool and die maker. He progressed through various jobs until ultimately he was promoted to experimental test mechanic lead man. His job required that he lift from ten to four hundred (10-400) pounds on a regular basis utilizing cranes and fellow employees when lifting the heavier materials.

Claimant alleges an injury to his back on February 5, 1991, while moving an I-beam at work. Subsequent to the incident he was sent to Boeing Central Medical and ultimately referred to Dr. Forney Fleming. He was returned to work with restrictions but missed a significant amount of work after the February 5, 1991 incident utilizing his vacation leave and sick leave pay rather than collecting temporary total disability benefits. Claimant continued his employment until May 17, 1991. At that time he testified he left because he was physically unable to continue doing his job. When cross-examined about prior problems, claimant advised he had never had a back problem before, only minor muscle

pulls while working at Boeing. He further denied experiencing any off the job injuries since the mid-1980's. He informed Boeing Central Medical any time he suffered any type of muscle pull or minor back incident at work.

Boeing controverted claimant's claim of an insignificant back history and also controverted his reason for leaving his employment on June 17. Debbie Vandegrift, personnel representative for Boeing, does termination interviews when people leave Boeing for any reason. She testified claimant, in his exit interview of May 17, 1991, advised he was leaving Boeing to move to Arizona and seek other employment. There was no indication claimant left due to his physical inability to do the job.

Subsequent to leaving Boeing claimant applied for employment with Piaggio Aviation. At the deposition of Susan Fout, Manager of Human Resources for Piaggio, respondent placed into evidence certain personnel records, including claimant's application. The information provided from Piaggio indicated claimant was available to go to work on July 22, 1991 and indicated his reason for leaving Boeing was that he wanted to return to tool and die work. There was no indication in the form that claimant needed any accommodations or suffered any serious injuries.

Nita Long, Manager of Personnel Relations for Beech Aircraft, also provided claimant's personnel records filled out with Beech. These documents contained no indication of any prior work-related injuries. They further indicated claimant's reason for leaving Boeing was a lay-off. When asked on the form if he was handicapped, claimant answered in the negative.

Claimant began receiving treatment from various doctors both prior to and subsequent to his February 5, 1991 alleged injury. Dr. Daniel Zimmerman, a medical practitioner with twenty-two (22) years experience with various employers specializing in internal medicine and soft tissue injuries, testified claimant advised him he injured his back while moving an I-beam in February 1990.

Dr. Fleming had the opportunity to review an MRI done July 20, 1990 which showed diffuse disc protrusions at L5-S1 and moderate protrusions at L4-L5. He was advised by claimant that the injuries suffered at Boeing led up to this MRI test. He felt claimant had a combined functional impairment of thirteen percent (13%) to the body and restricted claimant from returning back to work at any kind of heavy lifting. He indicated claimant should be limited to light activities including occasional twenty (20) pound lifts with ten (10) pound lifts frequently. He also advised claimant should only occasionally stoop, bend, twist and crawl, with standing being limited to six (6) hours at a time with normal breaks. He also advised claimant needed to sit periodically and should be directed toward more sedentary skills.

On cross-examination Dr. Fleming was advised that the claimant was actually alleging an injury in February 1991 rather than 1990 which would indicate the MRI done July 20, 1990 predated the claimant's injury. He agreed this contradicted claimant's allegation that he suffered no serious back injuries prior to February 1991. The doctor also felt claimant's comment that he never herniated a disc before February 1991 would be inaccurate. He was not advised that claimant had suffered injury in January 1988 while lifting weights or in February 1988 while moving a part. He was not told by claimant of a back injury suffered while moving a boat in March 1989. He further had no information concerning claimant suffering a water tubing injury in June 1989 again suffering low back

pain. He was not advised claimant suffered a weightlifting injury July 21, 1989, nor of claimant's August 29, 1989 injury suffered while moving a boat at home.

This information would have been pertinent to the doctor's consideration of claimant's injury and its relationship to his employment at Boeing. The doctor was also not told claimant suffered an injury in June 1990 while moving a freezer at home. It was this injury which ultimately led to the MRI discussed above. Dr. Fleming felt, after being provided this history, that moving the freezer at home would be the most significant or most notable injury prior to the MRI. He felt this information would cause him to reach a significant difference of opinion regarding the cause of claimant's ongoing problems.

Dr. Zimmerman noted that in his examination of claimant on November 11, 1991, claimant's ankle reflexes were nonexistent. Dr. Diana K. Ketterman examined claimant on February 14, 1991, and found claimant's ankle reflexes to be intact. Dr. Zimmerman opined this indicated physiological changes between February 14, 1991 and his examination in November.

Dr. Kenneth Zimmerman's deposition was taken by respondent. Dr. Zimmerman, an internal medicine specialist, has been with Boeing since 1960. He detailed a long history of treatments to claimant's back beginning first in 1981 when claimant suffered a pulled muscle in his back. Claimant was diagnosed on December 3, 1981 as having degenerative arthritis of the lower dorsal and lumbar spines with Schmorl's nodes, increased lumbosacral angulation, thinning of the disc at L5-S1 and a slight pelvic tilt. On February 8, 1988 claimant suffered an injury to his low back when he was moving a Little Joe to hook up to a battery charger. On this occasion claimant also developed sharp pain into his bilateral legs.

Claimant was also diagnosed as having lumbosacral angulation, thinning of the disc at L5-S1, posterior settling of the L5-S1 plus a reverse lateral lumbar curve and mild scoliosis.

On January 6, 1988, claimant was treated by Mark Dopps, D.C. subsequent to injuring his low back while lifting weights. Dr. Dopps further confirmed claimant's June 26, 1989 low back injury while tubing in the water. Claimant was also treated by Dr. Dopps on March 20, 1989 after injuring his back moving a boat at home and again while moving a boat on August 29, 1989. On January 8, 1990 claimant injured his back while dancing and sought treatment with Dr. Dopps. Again on June 26, 1990 after bending over putting on his clothes, he suffered back pain and sought treatment with Dr. Dopps.

Medical records from Dr. Kenneth Zimmerman indicate on June 28, 1990 claimant suffered an injury to his low back while moving a freezer at home. This injury ultimately led to the MRI done on July 24, 1990 which showed a herniated lumbar disc at L4-L5. Claimant was released to work with limitations of no squatting or lifting greater than twenty-five (25) pounds. On July 24, 1990 claimant's medical restrictions were modified. Claimant was limited to thirty (30) pounds lifting with no bending over ninety (90) degrees and no twisting over forty-five (45) degrees. The July 20, 1990 injury suffered by claimant also led to an examination and treatment by Dr. Diana Ketterman, a family practice specialist. Dr. Ketterman also reviewed the MRI from July 1990 which indicated protrusions at L5-S1 causing pressure on the right nerve root. She also diagnosed right side herniation at the L4-5 disc. Claimant continued working under specific weight restrictions for a significant period of time.

One of the most significant medical records in the file is that of Dr. Dopps indicating claimant suffered an injury on February 4, 1991, while moving furniture. Dr. Dopps treated claimant on February 4, February 6 and February 8 at which time he released claimant to return to work. At no time during this treatment did claimant mention to Dr. Dopps a work-related injury on February 5, 1991.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P. 2d 212, rev. denied 249 Kan. 778 (1991).

Claimant contends a work-related injury on February 5, 1991, rendering him unable to return to work at Boeing. Claimant alleges his departure from Boeing stems from his inability to perform his work yet in his exit interviews with Boeing claimant failed to mention this problem. He also subsequently filled out two job applications with different employers, at no time indicating his departure from Boeing was related to his job-related injuries and further failing to indicate ongoing problems as a result of these alleged injuries. The medical evidence in the file further erodes claimant's allegations of a February 5 injury.

With the multitude of contradictions found in the record, the Appeals Board finds that claimant has failed to prove by a preponderance of the credible evidence that he suffered an injury by accident arising out of and in the course of his employment with respondent on February 5, 1991.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey of March 16, 1994 shall be and is reversed and claimant is denied award against the respondent, The Boeing Company, its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for an injury alleged on February 5, 1991.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services	
Transcript of Regular Hearing	\$248.00
Deposition of Kenneth D. Zimmerman, M.D.	\$335.20
Deposition of Deborah Vandegrift	\$145.60
Deposition of Diana K. Ketterman, M.D.	\$281.80
Deposition of Nita Long	\$133.00
Deposition of Susan Fout	\$103.00
Deposition of Mark Dopps, D.C.	\$212.20
Don K. Smith & Associates	
Deposition of Bradley Cue	\$187.00
Deposition of Jerry D. Hardin	\$196.50
Pamela L. Lamar	
Deposition of Daniel D. Zimmerman, M.D.	\$480.75

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, Kansas
Frederick L. Haag, Wichita, Kansas
Orvel B. Mason, Arkansas City, Kansas
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director